Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN L. JENSEN - *PETITIONER*

VS .

HAROLD E. BROKAW,
OF THE SMALL BUSINESS ADMINISTRATION OF THE UNITED STATES 0F AMERICA - *RESPONDENR*

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John L. Jensen
Pre Se
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15 pp

QUESTION PRESENTED

Does a person who has property that will be adversely affected by a government project have the same right to comment on that project as people who will profit from it or have vested interest in it?

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

John L. Jensen, Petitioner

vs

Harold E. Brokaw of the Small Business Administration of the United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, John L. Jensen, respectively prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit upholding the decision of the District Court to dismiss when the issue is Due Process and the Circuit had said before that I had a Bivens claim but it had been filed wrong.

OPINIONS BELOW

The unpublished written opinion of the Eighth Circuit Court of Appeals is reported as John l. Jensen v. Harold E. Brokaw, Chief, Financing Division Agent, Small Business Administration, and appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Southern District of Iowa, Western Division appears in Appendix B to this Petition. The unpublished written opinion of the Eighth Circuit Court of Appeals titled John L. Jensen v. Small Business Administration, Des Moines District Office appears in Appendix C to this Petition.

JURISDICTION

The Eighth Circuit Court of Appeals' opinion in this matter was filed on September 20, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE

The United States District Court, Western Division of the Southern District of Iowa had jurisdiction pursuant to Title 28 U.S.C. 1331(b). This is a Bivens Action.

I had purchased a motel in Centerville, Iowa on May 1, 1989. The SBA awarded federal assistance in December to a borrower who used false information to obtain funds to help build a new Super 8 motel. I found out what was going on and used the Freedom of Information Act to obtain documents that were the basis for filing an Administrative Procedure Cliam (Form 95). This was filed in May of 1991. By September of 1991 I was financially exhausted and quit claimed the motel back to the former owner rather than go bankrupt.

I received a final denial of claim in November of 1991 and proceeded to file a Federal Tort Claim in April of 1992. This case was dismissed so I appealed to the 8th Circuit. They upheld the district court granting a motion to dismiss but they gave me a ray of hope. They said that I had a Bivens claim but it had been filed wrong (see Appendix C, page 1, para. 3). Next I filed a Bivens claim in district court but it got dismissed. I appealed to the 8th circuit court again but they still upheld the district courts dismissal. Now I come to you.

REASON FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons.

1. There is a conflict with the decision of this case and the past case is saying I have a Bivens claim.

2. This Petition presents an issue that will affect how government is to be run.

3. It will more clearly define when due process should be used.

4. It will also determine the limits of assistance government can give one person that is in competition with another person.

5. It will also uphold the power of the courts to enforce the Doctrine of Fundamental Fairness.

In the 8th Circuit Courts upholding of the district courts decision they relied on three arguments. The first was about due process. They stated that

"due process only comes into play when 'there has been a deprivation of life, liberty, or property within the Meaning of the Fifth or Fourteenth Amendment.'" It is my contention that my property was put at risk by government action so I should have had the opportunity to comment. I should have been allowed to show that the information given to the SBA was false. By not telling me what was going on I was deprived of facts that would have allowed me to press for Judical review. This is cause of action and cause of action is property interest protected by the due process clause (U.S.C.A. Const. Amend. 14; 10 U.S.C.A. § 2735).

I lost everything because of this government project. I have suffered more losses than many criminals and what is my crime? Nothing! I was a hard working motel operator who was trying to make a living.

Their second argument is that I had an indirect claim and therefore couldn't file a claim. They cited O'Bannon v. Town Court Nursing Center, 447 U.S 773,789 (1980).

They didn't read the fine print at the bottem of the page which states:

> (22) We, of course, need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. . .

The third argument they used is that it was competition and therefore is not protected by the Constitution. Although my losses were the result of competition, my claim is that I should have had the right to protect my property interest from someone who used false information to obtain federal assistance. Just because something was done in the name of competition does not mean that rules and regulations can be ignored.

The subject of competition has come before the court before it 1936 in Carter v. Carter Coal Co. 298 U.S. 238, 311 where it states as follows:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . The difference between producing coal and regulating its productions is, of course, fundamental. The former is a private activity; the latter is necessarily a government function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional

> interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. (Underlining by me)

THIS IS WHAT HAPPENED TO ME! A group of people who had vested interest in a new motel were given the right to tell the government that a new one was needed. If government is to be fair there should be due process. There is no reason not to have due process. If it was an honest program the government should be proud of it and tell people about it. Instead they keep it a secret and stab honest business people in the back so banks can have loans that are guaranteed BY THE GOVERNMENT! They don't care about other business people and just throw them to the wolves. I was one of them.

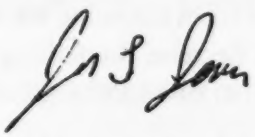
I don't know what more to say. I have lost a lot of property, money and years of my life because of this project. These losses could have been prevented if there had been due process. What happened to me is happening to other people in Iowa and the nation. We need the court to protect the honest business person.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals in this matter.

DATED: November 22, 1994.

Respectfully submitted,



JOHN L. JENSEN

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-1722

John L. Jensen,
Appellant,

v.

Harold E. Brokaw, Chief,
Financing Division Agent,
Small Business Administration,
Appellee.

Appeal from the United States
District Court for the
Southern District of Iowa.

[UNPUBLISHED]

Submitted: September 15, 1994

Filed: September 20, 1994

Before MAGILL, LOKEN, and MORRIS SHEPPARD ARNOLD,
Circuit Judges.

PER CURIAM.

John L. Jensen filed a pro se Bivens suit against Harold E. Brokaw, an employee of the Small Business Administration (SBA). Jensen alleged that Brokaw denied him due process when he approved a loan for construction of a rival motel without first notifying Jensen and giving him an opportunity to comment. The district court[2] dismissed the suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. This appeal followed. We affirm the district court.

We review de novo the dismissal of a complaint for failure to state a claim. See Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993). Jensen's

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[1]Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[2]The HONORABLE CHARLES R. WOLLE, Chief Judge, United States District Judge for the Southern District of Iowa.

due process argument centers around the rival motel's adverse impact on the value of his former motel. Procedural due process, however, comes into play only when "there has been a deprivation of life, liberty, or property within the meaning of the Fifth or Fourteenth Amendment." Schneider v. United States, 27 F.3d 1327, 1332 (8th Cir. 1993). We agree with the district court that Jensen did not state a Bivens claim. See O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 789 (1980) (Fifth Amendment does not apply to indirect adverse effects of governmental action); A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360, 362 (1st Cir. 1987) (per curiam) ("freedom from competition is not constitutionally protected" (quoted case omitted).[1]

Accordingly, we affirm.

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CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1]Jensen has misconstrued our holding in a prior related civil action as a statement that he had a meritorious Bivens claim on these facts. See Jensen v. Small Bus. Admin., No. 931996, slip op. at 2 (8th Cir. Sept. 9, 1993) (unpublished per curiae) (due process allegations were properly construed as Bivens claim which could not be asserted against United States and its agencies).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

JOHN L. JENSEN,
Plaintiff,

vs .

UNITED STATES OF AMERICA,
Defendant.

No. 1-93-CV-80036

Order

In 1992, pro se plaintiff John L. Jensen filed suit (no. 192CV-80024) against the Small Business Administration (SBA), Des Moines District Office. He asserted the SBA improperly granted a loan to his competitor and that the agency denied him due process when it granted the loan without first allowing him an opportunity to be heard. This court dismissed that suit; the United States Court of Appeals for the Eighth Circuit affirmed that decision.

Plaintiff, again pro se, next filed this action against Harold E. Brokaw, an SBA Des Moines employee. Plaintiff asserts he was denied due process when the SBA approved a loan to his competitor without allowing plaintiff a chance to comment. The United States Attorney for the Southern District of Iowa subsequently certified that Harold Brokaw was acting within the scope of his employment and substituted the United States of America as the sole defendant pursuant to 28 United States Code section 2679(d)(1). The court on December 22, 1993 entered an order of substitution.

Before the court for ruling are the plaintiff's motion to set aside order and the defendant's motion to dismiss. The court held a hearing on the motions on January 28, 1994, then granted the parties additional time to file supporting papers. The court now grants plaintiffs motion to set aside order and grants defendant's motion to dismiss.

Motion to set aside order. Plaintiff challenges the court's order of substitution dated December 22, 1993. That order, entered at defendant's request and upon notice to plaintiff, provided for the substitution of the United States of America for defendant Brokaw in accordance with provisions of the Federal Tort Claims Act (FTCA).

Plaintiff asserts, however, that his claim in this second action is not brought under the FTCA but is instead a Bivens constitutional tort claim. Plaintiff's complaint states that it is a "Bivens Action"; it does not refer to the FTCA.

Defendant's only authority for the substitution was the FTCA. That statute is not applicable here. Plaintiff's motion to set aside the court's order of December 22, 1993 is granted. The clerk of court shall remove from the caption as a defendant the United States of America and replace it with Harold E. Brokaw of the Small Business Administration of the United States of America.

Motion to dismiss. Defendant argues that plaintiff is prevented by the doctrine of res iudicata from relitigating issues previously before this court. In dismissing plaintiff's Bivens claim in his first suit, this court stated that plaintiff asserted no due process violation because he had identified no life, liberty, or property interest of which he was deprived. The United States Court of Appeals for the Eighth Circuit stated that the Bivens claim in plaintiff's first suit was properly dismissed because it could not be asserted directly against the named defendant in that suit, the agency. Jensen v. Small Business Administration. Des Moines District Office, No. 931996 (8th Cir. September 9, 1993). Granted, plaintiff has now brought suit against neither the United States nor its agency. He now sues an agency employee. Nevertheless, his complaint in this second action is still plagued with the problem he confronted in his first suit: he does not allege an actionable due process violation. He concedes the evidence he would present in this action is identical to the evidence he would have presented in his first suit. Plaintiff identifies no life, liberty, or property interest protected by the Due Process Clause of the United States Constitution.

Moreover, in Bivens the court implied a cause of action for damages in a suit against federal employees for unconstitutional acts they committed. Here, plaintiff contends Brokaw did what the law required him to do. Plaintiff attacks as unconstitutional only the rules Brokaw, acting within the scope of his authority, applied. Bivens simply does not apply to the facts plaintiff alleges.

Defendant's motion to dismiss is granted. The clerk of court shall dismiss the complaint.

SO ORDERED.

Dated this 25 day of February, 1994.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-1996

John L. Jensen,
Appellant,

v.

Small Business Administration,
Des Moines District Office,
Appellee.

Appeal from the Untied States
District Court for the
Southern District of Iowa.

[UNPUBLISHED]

Submitted: August 13, 1993

Filed: September 9, 1993

Before FAGG, BOWMAN, and LOKEN, Circuit Judges.

PER CURIAM.

John L. Jensen appeals from the district court's dismissal of his claim that he lost his motel when the Small Business Administration (SBA) improperly financed the construction of a competing motel in Centerville, Iowa. We affirm.

Jensen's pro se complaint alleged that SBA's loan to his competitor violated the policy declaration in 15 U.S.C. § 661 and an SBA regulation, 13 C.F.R. § 108.503(b)(2), and that the agency denied him due process by granting the loan without giving him an opportunity to be heard on these issues. The district court[1] granted the government's motion to dismiss, and Jensen appeals.

The district court properly construed Jensen's due process allegations as a claim under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). A Bivens claim may not be asserted directly against the United States and its

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[1]The HONORABLE CHARLES R. WOLLE, United States District Judge for the Southern District of Iowa.

agencies. See Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982) ("Bivens and its progeny do not waive sovereign immunity for actions against the United States"), cert. denied, 459 U.S. 1210 (1983).

Giving Jensen's pro se complaint the benefit of a broad reading, the district court also considered whether his claims are actionable under the Federal Tort Claims Act. See 28 U.S.C. SS 2671-80. However, the FTCA has not waived the government's sovereign immunity for claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty," 26 U.S.C. S 2680(a). We agree with the district court that SBA's decision to finance construction of the rival motel is covered by the discretionary function exception. See United States v. Gaubert, 111 Sup. Ct. 1267 (1991); Layton v. United States, 984 F.2d 1496 (8th Cir. 1993), pet'n for cert. filed, No. 935118, _ U.S.L.W. (Jun. 11, 1993).

Because Jensen's claims were barred by the doctrine of sovereign immunity, the district court properly dismissed his complaint. See Dewitt Bank & Trust Co. v. United States, 878 F.2d 246, 246 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.